Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad (an infant)

HIGH COURT (TAIPING) — CIVIL APPEAL NO 12–61–92
ABDUL MALIK ISHAK JC
19 JANUARY 1994

Tort *— Negligence — Contributory negligence — Four-year-old boy — Test applicable in considering contributory negligence*

Tort *— Negligence — Duty of care — Motor cyclist — Standard of care owed*

Civil Procedure *— Pleadings — Departure from pleadings — Effect of evidence given at trial which is not consistent with pleaded defence*

Civil Procedure *— Appeal — Statutory minimum amount — Requirements of s 28(1) of the Courts of Judicature Act 1964 — Courts of Judicature Act 1964 s 28(1)*

The respondent, a four-year-old boy ('the child'), was knocked down by a motor cycle ridden by the first appellant, a postman. He sustained injuries and sued by his father and next friend, Ahmad bin Yusof. The first appellant admitted that he did not see the child at all and while giving evidence, deviated from his pleaded defence. Counsel for the appellants contended that the child, though an infant, should be held partially liable. The sessions court judge brushed aside the question of contributory negligence on the part of the child and found the appellants solely liable. The appellants appealed.

Held, dismissing the appeal:

(1) The degree of care attached to a child should be different from that of an adult. That degree of care must be proportionate to the age of the child. The younger the child is, the lesser the degree of care attributable to the child. This must, however, be dependent on the facts of each case.

(2) The first appellant must have been negligent in not paying attention while riding the motor cycle as it was his duty to put himself in a position where he could stop his motor cycle in the event of an emergency. The standard of care required of a motorist is very high as the motor cycle could be considered a lethal weapon.

(3) The first appellant's deviation from his pleaded defence would place the testimony of the first appellant highly suspect. It is trite law that where the particulars of negligence as pleaded by the defence differ drastically and entirely from the version given by the defendant in court, the court is entitled not to accept the defendant's story. It was thus not surprising that the sessions judge rejected outright the first appellant's version and gave judgment to the child.

(4) As the quantum involved in this case was below RM10,000 and the memorandum of appeal did not raise any question of law as required under s 28(1) of the Courts of Judicature Act 1964, the appeal was dismissed with costs.

[Bahasa Malaysia summary

Responden, seorang kanak-kanak berumur empat tahun ('kanak-kanak itu'), telah dilanggar oleh sebuah motosikal yang dipandu oleh perayu pertama, seorang posmen. Beliau mengalami kecederaan dan mendakwa melalui bapa dan sahabat wakilnya, Ahmad bin Yusof. Perayu pertama mengaku bahawa beliau langsung tidak nampak kanak-kanak itu dan semasa memberi keterangan, telah menyeleweng daripada pembelaan di dalam pliding pembelaannya. Peguam pihak perayu menegaskan bahawa kanak-kanak itu, walaupun seorang budak, seharusnya menanggung sebahagian daripada liabiliti untuk kemalangan itu. Hakim mahkamah sesyen tidak mengendahkan soalan mengenai kecuaian sertaan pada pihak kanak-kanak itu dan mendapati bahawa perayu bertanggungjawab sepenuhnya. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Tahap berjaga-jaga yang terletak pada seorang kanak-kanak seharusnya berlainan daripada seorang dewasa. Tahap berjaga-jaga itu mesti mengikut kadar umur kanak-kanak itu. Lebih muda seseorang kanak-kanak itu, kurang tahap berjaga-jaga yang terletak pada kanak-kanak itu. Walau bagaimanapun, ini mesti bergantung kepada fakta setiap kes.

(2) Perayu pertama semestinya cuai kerana tidak memberi perhatian apabila menunggang motosikal itu kerana adalah merupakan tanggunjawabnya untuk meletakkan dirinya di dalam kedudukan di mana beliau boleh memberhentikan motosikalnya apabila berlaku kecemasan. Darjah berjaga-jaga yang diperlukan daripada seorang pemandu motosikal sangatlah tinggi oleh kerana motosikal itu boleh dianggap sebagai sesuatu benda yang merbahaya.

(3) Penyelewengan perayu pertama daripada pembelaan di dalam plidingnya akan menjadikan testimoni perayu pertama sangat dicurigai. Adalah menjadi undang-undang mantap bahawa di mana butir-butir kecuaian seperti yang diplikan oleh pihak pembelaan berlainan secara drastik dan sepenuhnya daripada versi yang diberikan oleh defendan di mahkamah, mahkamah berhak untuk menolak cerita defendan itu. Oleh itu, tidaklah menghairankan bahawa hakim mahkamah sesyen telah terus menolak versi perayu pertama dan memberi penghakiman kepada kanak-kanak itu.

(4) Oleh kerana kuantum yang terlibat di dalam kes ini kurang daripada RM10,000 dan memorandum rayuan tidak menimbulkan sebarang soalan mengenai undang-undang seperti yang diperlukan di bawah

A s 28(1) Akta Mahkamah Kehakiman 1964, rayuan ini ditolak dengan kos.]

Notes

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed) paras 283–298; [1991] Mallal's Digest 1932–1933; [1992] Mallal's Digest 1650.

For cases on the statutory minimum amount for appeals, see 2 *Mallal's Digest* (4th Ed) paras 455–458.

For cases on departure from pleadings, see 2 *Mallal's Digest* (4th Ed) paras 1724–1726.

Cases referred to

1 *Liow Siow Long v PP* [1970] 1 MLJ 40 (refd)
2 *Jag Singh v Toong Fong Omnibus Co Ltd* [1962] MLJ 271 (refd)
3 *Tan Guan Cheng & Anor v Kuala Lumpur, Klang & Port Swettenham Omnibus Co Ltd* [1971] 1 MLJ 49 (refd)
4 *Abraham v Choo Jit Fung & Anor* [1966] 1 MLJ 97 (refd)
5 *Govinda Raju & Anor v Laws* [1966] 1 MLJ 188 (distd)
6 *Daly v Liverpool Corp* [1939] 2 All ER 142 (folld)
7 *PR Panickar v Chwee May Kwong & Anor* [1958] MLJ 136 (refd)
8 *Nicholas Arthur Nock v Mohamed Ali bin Suleiman & Anor* [1976] 1 MLJ 252 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 28(1)

Jamaluddin Mohd Din (*Jamal & Associates*) for the appellants.
Juhaida bte Abdul Kadir (*Sandu & Co*) for the respondent.

Abdul Malik Ishak JC: The respondent, a young agile boy of four years of age, ran across a red laterite kampong road and was knocked down by a motor cycle ridden by the first appellant, a postman. The boy sustained the following injuries:

(1) abrasion wound on the medial aspect of the left ankle; and
(2) fractured midshaft at the left tibia/fibula,

and he sued by his father and next friend, Ahmad bin Yusof.

The Sessions Court, Sungai Siput, Perak gave judgment to the respondent and held the appellants to be solely blameworthy. The appellants appealed against that decision.

The learned judge of the sessions court brushed aside the question of contributory negligence on the part of the respondent and, on the facts before him, found the appellants solely liable. The learned counsel for the appellants made a concerted attack and criticized the judgment of the sessions judge.

It is not disputed that the first appellant had completed his rounds for the day and was travelling along that stretch of red laterite kampong road

to proceed to the main road. A witness, one Abdul Aziz bin Nordin, stated that as the boy darted across the road to his grandfather's house (incidentally the boy is his nephew), the handle of the motor cycle came into contact with the boy; the motorcyclist lost control and fell onto the road. As the motorcyclist fell, the motor cycle landed on the boy. It was in evidence that that boy used to frequent the road in order to go to his grandfather's house. Though Abdul Aziz bin Nordin is related to the respondent, his evidence is not tainted and is reliable. He was at the scene and gave a running commentary of what had transpired. There was no evidence that his evidence was tainted in the sense propounded by *Liow Siow Long v PP.*[1]

It would be interesting to note that the first appellant in his evidence admitted that he did not see the boy at all on that fateful day. That would certainly have resolved the question of liability in favour of the boy. The learned counsel advanced a novel point that that boy, though an infant, should be held partially liable. In short, there should be contributory negligence on the boy's part.

The case of *Jag Singh v Toong Fong Omnibus Co Ltd*[2] was cited for the proposition that 'a child who had sufficient discretion to travel to and from school should have sufficient discretion to appreciate that it is a dangerous thing to get in the way of a moving omnibus'. The child in *Jag Singh*'s case[2] was about seven years of age at the time of the accident.

In *Tan Guan Cheng & Anor v Kuala Lumpur, Klang & Port Swettenham Omnibus Co Ltd*,[3] it was held, inter alia, that the court should take into account the age of the boy in considering whether he was liable for contributory negligence. Abdul Hamid J (as his Lordship then was, now the Lord President) concluded [at p 50 col 1G–H] that:

> In the circumstances of this particular case, I am of the opinion that in view of his tender age, he cannot be held liable for negligence. I therefore hold that there was no contributory negligence on the part of PW2. For these reasons, I find the defendants liable for the negligence of their servants.

It is pertinent to point out that the boy in *Tan Guan Cheng*'s case[3] was eight years of age at the material time.

In *Abraham v Choo Jit Fung & Anor*,[4] the first respondent, a schoolgirl aged seven years ten months, was knocked down by a car driven by the appellant while she was crossing a road with three other girls on their way to school. It was held by the Federal Court that a child of the respondent's age in the circumstances of that collision (there was nothing irregular or unsatisfactory in the manner in which she crossed the road) should not be held in any degree or in any way to blame for the accident.

To water down the negligence of the first appellant, it was submitted that the first appellant was 'perplexed or agitated when exposed to danger' — to borrow the words of Raja Azlan Shah J (as His Majesty then was) in the case of *Govinda Raju & Anor v Laws.*[5] But the facts in *Govinda Raju*'s case[5] are poles apart from our present appeal. There the plaintiff saw the motor vehicle swerving into his path. Here, the first appellant, on his own admission, did not see the respondent at all.

A In my judgment, the degree of care attached to a child should be different from that of an adult. That degree of care must be proportionate to the age of the child. The younger the child is, the lesser the degree of care attributable to the child. This must, however, be dependent on the facts of each case. I am fortified in my view by a passage appearing in *Charlesworth on Negligence* (3rd Ed) at p 528 to the following effect:

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> When a child is negligent, in the sense that he could by the exercise of 'reasonable care' have prevented or avoided the damage in question, he cannot recover; but in considering what is 'reasonable care' the age of the child must be considered. Infancy as such is not a 'status conferring right' so that the test of what is contributory negligence is the same in the case of a child as of an adult modified
> C only to the extent that the degree of care to be expected must be proportionate to the age of the child.

The first appellant must have been negligent in not paying attention while riding the motor cycle. It was the first appellant's duty to put himself in a position where he could stop his motor cycle in the event of an emergency.
D The first appellant's admission of not seeing the boy on the red laterite kampong road speaks loudly against him. Nowadays, the standard of care required of a motorist is very high, as has been stated time and again by the courts in England. Stable J, for instance, in *Daly v Liverpool Corp*,[6] especially at p 144 had this to say on this point:

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> My view is that the sooner it is recognized as being the law that a person who drives a motor vehicle under modern conditions is in precisely the same position as, for instance, that of a surgeon or a person who undertakes to perform an extremely difficult task, involving extremely dangerous consequences for other persons, the better. The standard of care and skill which the law must demand from the driver of a motor car today is a very high one indeed. A motor car has
> F become a lethal weapon.

Likewise, in the present appeal, the motor cycle is a lethal weapon.

Next, the appellants in their statement of defence blamed the boy's parents for the accident. The statement of defence worded in strong terms sounded like this:

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> Defendan-defendan seterusnya menyatakan kemalangan tersebut berlaku di atas sebab kecuaian ibubapa/penjaga budak plaintif tersebut.
>
> Butir-butir kecuaian
>
> (1) Gagal mengawal budak plaintif sewajarnya sewaktu berlaku kemalangan.
> (2) Gagal memberi perhatian dengan sempurna kepada budak plaintif.
> H (3) Gagal membantu budak plaintif melintas jalan kemalangan tersebut.

In his oral evidence before the Sessions Court, Sungai Siput, Perak, the first appellant gave evidence and deviated from his pleaded defence. The deviation would place the testimony of the first appellant highly suspect (*PR Panickar v Chwee May Kwong & Anor*[7]). It is now trite law that where the particulars
I of negligence as pleaded by the defence, drafted presumably on instructions, differ drastically and entirely from the version given by the defendant in court, the court is entitled not to accept the defendant's story (*Nicholas*

Arthur Nock v Mohamed Ali bin Suleiman & Anor[8]). It was thus not surprising that the sessions judge rejected outright the first appellant's version and gave judgment to the respondent.

Another more potent point, the decisive factor, in favour of the respondent is this. It was argued, rather admirably, that the quantum involved was below RM10,000 and the memorandum of appeal did not raise any question of law and, consequently, the appeal should be dismissed forthwith with costs. I am impressed by this short and curt point. Section 28(1) of the Courts of Judicature Act 1964 provides:

> Subject to any other written law, no appeal shall lie to the High Court from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject-matter is ten thousand ringgit or less except on a question of law.

In my judgment, in the case of an appellant intending to appeal from the decision of the subordinate court where the quantum is less than RM10,000, the notice of appeal in Form 140 must state generally the question or questions of law that he wishes to appeal on. Any failure to conform to this basic statutory requirement would strike at the very core of the appeal and, consequently, would nullify the appeal.

For the reasons adumbrated above, I dismissed the appeal with costs.

Appeal dismissed.

Reported by Anne Khoo